

1 PILLSBURY WINTHROP SHAW PITTMAN LLP
2 BRUCE A. ERICSON (SBN 76342)
3 bruce.ericson@pillsburylaw.com
4 LEE BRAND (SBN 287110)
5 lee.brand@pillsburylaw.com
6 Four Embarcadero Center, 22nd Floor
7 San Francisco, CA 94111-5998
8 Telephone: 415.983.1000
9 Facsimile: 415.983.1200

6 Attorneys for Amicus Curiae,
7 Delaware Attorney General

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9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **OAKLAND DIVISION**

12 ELON MUSK, et al.,

13 Plaintiffs,

14 v.

15 SAMUEL ALTMAN, et al.

16 Defendants.

Case No. 4:24-CV-04722-YGR

Honorable Yvonne Gonzalez Rogers

**BRIEF OF AMICUS CURIAE
KATHLEEN JENNINGS IN HER
CAPACITY AS THE ATTORNEY
GENERAL FOR THE STATE OF
DELAWARE REGARDING
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

17 Date: January 14, 2025

18 Time: 2:00 p.m.

19 Place: Courtroom 1, 19th Floor
20 1301 Clay St.
21 Oakland, CA 94612

1 Amicus Curiae, Kathleen Jennings, the Attorney General of the State of Delaware
2 (the “Delaware Attorney General”), respectfully presents this brief for the Court’s
3 consideration in connection with Plaintiffs’ Motion for a Preliminary Injunction (the
4 “Motion”) in the above-captioned action. *See* ECF 46.

5 I. INTRODUCTION

6 Plaintiffs seek, among other things, to preliminarily enjoin a transaction alleged to
7 involve the conversion of OpenAI, Inc. (“OpenAI”), a Delaware charitable nonstock
8 corporation that was organized entirely for not-for-profit purposes, into a for-profit entity
9 (the “Proposed Transaction”).¹ *See* ECF 46. According to an OpenAI blogpost dated
10 December 27, 2024, OpenAI’s “plan is to transform [its] existing for-profit [subsidiary,
11 OpenAI Global LLC] into a Delaware Public Benefit Corporation (PBC) with ordinary
12 shares of stock and the OpenAI mission as its public benefit interest.” *See* Declaration of
13 Lee Brand (“Brand Decl.”), Ex. A. According to such plan, the charitable nonstock
14 corporation would then hold “shares in the PBC” and the PBC would “run and control
15 OpenAI’s operations and business, while the nonprofit will hire a leadership team and staff to
16 pursue charitable initiatives in sectors such as health care, education, and science.” *See*
17 *id.* To enjoin the Proposed Transaction, Plaintiffs must establish, among other things, that an
18 injunction is “in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20
19 (2008).

20 The Delaware Attorney General submits this brief to make the Court aware that she is
21 conducting a concurrent review of the Proposed Transaction on behalf of the public pursuant
22 to her authority under Delaware law. Specifically, the Delaware Attorney General has
23 authority to review the Proposed Transaction for compliance with Delaware law by ensuring,
24 among other things, that the Proposed Transaction accords with OpenAI’s charitable purpose
25 and the fiduciary duties of OpenAI’s board of directors. The Delaware Attorney General has
26 not yet concluded her review or reached any conclusions regarding the Proposed Transaction,
27 and she takes no position on the propriety of a preliminary injunction in this case. The Court,

28 ¹ OpenAI refers to the Proposed Transaction as a “reorganization.” ECF 64, at 5.

1 however, should be aware that Delaware will not hesitate to take appropriate action to protect
2 the public interest if the Delaware Attorney General’s review demonstrates that such action is
3 warranted.

4 II. ARGUMENT

5 The Delaware Attorney General has the authority and responsibility to oversee
6 Delaware charitable corporations. “Delaware law unambiguously places the burden of
7 protecting the interests of beneficiaries [of a charity] upon the Attorney General.” *Oberly v.*
8 *Kirby*, 592 A.2d 445, 468 (Del. 1991) (citing *Wier v. Howard Hughes Med. Inst.*, 407 A.2d
9 1051, 1057 (Del. Ch. 1979)). The public is the ultimate beneficiary that the Attorney
10 General represents. *Wier*, 407 A.2d at 1057.

11 “[T]he test as to the legality of action taken by the governing board of a [charitable]
12 corporation is to be determined in accordance with principles of corporate law.” *Oberly*, 592
13 A.2d at 466 (quoting *Denckla v. Indep. Found.*, 193 A.2d 538, 541 (Del. 1963)). If the
14 Delaware Attorney General determines that any transaction is contrary to Delaware corporate
15 law, then she may “seek injunction or rescission of the tainted transaction.” *Oberly*, 592
16 A.2d at 468.

17 Pursuant to her responsibility and authority to protect the public by supervising and
18 overseeing charities, the Delaware Attorney General is in ongoing dialogue with OpenAI
19 regarding the Proposed Transaction. The Delaware Attorney General’s authority includes the
20 ability to review the transaction for, *inter alia*, whether the charitable purpose of Open AI’s
21 charitable assets would be lost or impaired; whether any intended for-profit entity will adhere
22 to the existing charitable purpose of OpenAI (assuming the not-for-profit entity remains
23 affiliated with it); whether OpenAI’s directors are meeting their fiduciary duties; and
24 whether, if applicable, the Proposed Transaction satisfies Delaware’s “entire fairness” test.

25 Under Delaware law, a nonprofit organization must be organized and operated
26 exclusively for charitable, religious, educational, scientific, or literary purposes. OpenAI is a
27 charitable nonstock corporation first incorporated in Delaware on December 8, 2015. *See*
28 Brand Decl., Ex. B (Certificate of Incorporation). OpenAI’s original corporate purpose was

1 “to provide funding for research, development and distribution of technology related to
2 artificial intelligence.” *Id.* In April 2020, OpenAI’s corporate purpose was amended via the
3 adoption of an Amended and Restated Certificate of Incorporation (Brand Decl., Ex. C) (the
4 “Amended Certificate”), which provides that OpenAI’s specific purpose is:

5 [to] ensure that artificial general intelligence benefits all of humanity, including
6 by conducting and/or funding artificial intelligence research. The corporation
7 may also research and/or otherwise support efforts to safely develop and
8 distribute such technology and its associated benefits, including analyzing the
societal impacts of the technology and supporting related educational,
economic, and safety policy research and initiatives.

9 *Id.* The Amended Certificate further states that the “resulting technology will benefit the
10 public and the corporation will seek to distribute it for the public benefit when applicable.
11 The corporation is not organized for the private gain of any person.” *Id.*

12 The Delaware Attorney General is reviewing the Proposed Transaction to ensure that
13 OpenAI is adhering to its specific charitable purposes for the benefit of the public
14 beneficiaries, as opposed to the commercial or private interests of OpenAI’s directors or
15 partners. “Any action that poses a palpable and identifiable threat to those [charitable] goals,
16 or that jeopardizes its assets would be contrary to the Certificate [of Incorporation] and hence
17 *ultra vires.*” *Oberly*, 592 A.2d at 462.

18 As part of this review, the Delaware Attorney General will consider whether the
19 OpenAI board members are satisfying their fiduciary duties to OpenAI’s beneficiaries—the
20 public. *See Gassis v. Corkery*, No. CIV.A. 8868-VCG, 2014 WL 2200319, at *14 (Del. Ch.
21 May 28, 2014), *aff’d*, 113 A.3d 1080 (Del. 2015) (explaining “a nonprofit charitable
22 corporation’s board owes fiduciary duties to its *beneficiaries*” (emphasis in original)).
23 Specifically, each board member has a fiduciary duty “to act with fairness and loyalty,
24 devoid of considerations of self-interest” and “to advance [OpenAI’s] charitable goals and
25 protect its assets.” *See Oberly*, 592 A.2d at 462. In connection with the Proposed
26 Transaction, the board members must act to advance OpenAI’s charitable purpose and
27 protect its charitable assets for the benefit of the public, without any consideration of their
28 own self-interest.

1 To the extent the Proposed Transaction is an “interested transaction,” Delaware law
2 may also require that the Proposed Transaction meet the “entire fairness” standard, which
3 would include assessing the fairness of the price and the fairness of the negotiations. *See*
4 *Oberly*, 592 A.2d. at 468-69. If implicated, this too will be part of the Delaware Attorney
5 General’s review.

6 While the parties before this Court have generally referenced the public interest and
7 how it will be impacted by their respective positions, the interest of the charity’s
8 beneficiaries receives only limited consideration in the briefing. *See* ECF 46, at 24-25; ECF
9 64, at 25; ECF 65, at 22-23. The Proposed Transaction—or its enjoinder—is likely to have
10 multiple and profound impacts on the public. The Delaware Attorney General is well-
11 positioned to consider how the interests of the charity’s beneficiaries are best served. If the
12 Delaware Attorney General concludes that the Proposed Transaction is not consistent with
13 OpenAI’s mission and its obligations to the public, that OpenAI’s board members are not
14 fulfilling their fiduciary duties, or, if applicable, that the value of the Proposed Transaction or
15 the process for deriving it is not entirely fair, the Delaware Attorney General will take
16 appropriate action, whether through a requested modification of the terms of the Proposed
17 Transaction or, if necessary, by seeking an injunction if and when she determines judicial
18 intervention is necessary.

19 III. CONCLUSION

20 Respectfully, the Delaware Attorney General submits this amicus brief to make the
21 Court aware that she is exercising her authority under Delaware law to review the multiple
22 impacts of the OpenAI Proposed Transaction on the public and, conversely, the multiple
23 impacts of modifying or enjoining the Proposed Transaction on the public. This concurrent
24 review is ongoing, and the Delaware Attorney General currently takes no position on the
25 propriety of a preliminary injunction in this case. Nevertheless, the Delaware Attorney
26 General thought it prudent to bring this concurrent review to the Court’s attention insofar as
27 it may inform how the Court wishes to address the pending Motion for a Preliminary
28 Injunction.

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Dated: December 30, 2024

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: /s/ Lee Brand

Bruce A. Ericson

Lee Brand

Attorneys for Amicus Curiae Delaware Attorney General